

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DATATREASURY CORPORATION,

Plaintiff

v.

2:06-CV-72 DF

WELLS FARGO & COMPANY; WELLS FARGO & COMPANY; WELLS FARGO BANK, NATIONAL ASSOCIATION; BANK OF AMERICA CORPORATION; BANK OF AMERICA, NATIONAL ASSOCIATION; U.S. BANCORP; U.S. BANK, NATIONAL ASSOCIATION; WACHOVIA CORPORATION; WACHOVIA BANK, NATIONAL ASSOCIATION; SUNTRUST BANKS, INC.; SUNTRUST BANK; BB&T CORPORATION; BRANCH BANKING AND TRUST COMPANY; BANCORPSOUTH, INC.; BANCORPSOUTH BANK; COMPASS BANCSHARES, INC.; COMPASS BANK; CULLEN/FROST BANKERS, INC.; THE FROST NATIONAL BANK; FIRST HORIZON NATIONAL CORPORATION; FIRST TENNESSEE BANK, NATIONAL ASSOCIATION; HSBC NORTH AMERICA HOLDINGS INC.; HSBC BANK USA, N.A.; HARRIS BANKCORP, INC.; HARRIS N.A.; NATIONAL CITY CORPORATION; NATIONAL CITY BANK; ZIONS BANCORPORATION; ZIONS FIRST NATIONAL BANK; BANK OF NEW YORK CO., INC.; THE BANK OF NEW YORK; UNIONBANCAL CORPORATION; UNION BANK OF CALIFORNIA, NATIONAL ASSOCIATION; BANK OF TOKYO-MITSUBISHI UFJ, LTD.; CITIZENS FINANCIAL GROUP, INC. CITY NATIONAL CORPORATION; CITY NATIONAL BANK; COMERICA INCORPORATED; COMERICA BANK & TRUST, NATIONAL ASSOCIATION; DEUTSCHE BANK TRUST COMPANY AMERICAS; FIRST CITIZENS

BANCSHARES, INC.; FIRST CITIZENS BANK & TRUST COMPANY; KEYCORP; KEYBANK NATIONAL ASSOCIATION; LASALLE BANK CORPORATION; LASALLE BANK NA; M&T BANK CORPORATION; M&T BANK; THE PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK, NATIONAL ASSOCIATION UBS AMERICAS, INC.; SMALL VALUE PAYMENTS COMPANY, LLC; THE CLEARING HOUSE PAYMENTS COMPANY, LLC; MAGTEK, INC; FIRST DATA CORPORATION; TELECHECK SERVICES, INC., REMITCO, LLC; and ELECTRONIC DATA SYSTEMS CORP.

Defendants

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR MORE DEFINITE STATEMENT

Defendants Bank of America Corporation; Bank of America, N.A.; Bank of New York Co., Inc.; Bank of Tokyo-Mitsubishi UFJ, Ltd.; BB&T Corporation; Branch Banking and Trust Company; Citizens Financial Group, Inc.; Comerica Bank & Trust, N.A.; Comerica Incorporated; Cullen/Frost Bankers, Inc.; Deutsche Bank Trust Company Americas; First Data Corporation; LaSalle Bank Corporation; LaSalle Bank, N.A; M&T Bank Corporation.; M&T Bank; Remitco, LLC; TeleCheck Services, Inc.; The Bank of New York; The Frost National Bank; UBS Americas, Inc.; Union Bank of California, N.A.; Wachovia Bank, N.A.; Wachovia Corporation; Wells Fargo & Company; and Wells Fargo Bank, N.A. (hereinafter "Defendants") hereby jointly file this Reply in Support of Defendants' Motion to Dismiss or in the Alternative for More Definite Statement.

In its Response to Defendants' Motion to Dismiss or in the Alternative for a More Definite Statement, DataTreasury Corporation (hereinafter "DTC") continues to fail to describe

the means by which the fifty-six Defendants infringe one or more of the six patents at issue in this case. DTC's continued reference to general "products and services" does not satisfy DTC's pleading requirements, even under the cases DTC cites in support of its position. DTC's failure to describe the means sufficiently will inevitably result in delays as the fifty-six Defendants, comprised of operating banks, holding companies, third-party financial processors, hardware and software vendors and other service providers, endeavor to discern DTC's claims related to the six patents at issue.

I. DTC'S REFERENCE TO "PRODUCTS AND SERVICES" DOES NOT SATISFY THE NOTICE PLEADING STANDARD.

DTC relies on the Federal Circuit decision in *Phonometrics* for the proposition that DTC is not required to identify the infringing "products and services" in its Amended Complaint. *Phonometrics Inc. v. Hospitality Franchise Sys. Inc.*, 203 F.3d 790 (Fed. Cir. 2000). In the *Phonometrics* case, however, the Federal Circuit did not address the substance of the initial notice pleading, but instead reversed the trial court's requirement that the plaintiff tailor its amended complaint to conform to the court's interpretation of the meaning of the patent claims following a *Markman* hearing construing the claims. *Phonometrics*, 203 F.3d at 794 ("The Rule 12(b)(6) pleading requirements . . . do not require a patentee to amend its claims to include specific allegations about each limitation once a court has construed the claims of the patent.").

Even if *Phonometrics* can be construed as setting a standard for notice pleading for patent infringement, DTC has not described the means by which the Defendants allegedly infringe. According to DTC, its description of "products and services" as the means by which the Defendants allegedly infringe provides the same level of detail as the complaints in *OKI Elec. Indus. Co., Ltd. v. LG Semicon Co., Ltd.*, Case No. 97-20310-SW, 1998 U.S. Dist. LEXIS 22507 (N.D. Cal. February 25, 1998); *One World Techs., Ltd. v. Robert Bosch Tool Corp.*, Case No. 04-

C-0833, 2004 U.S. Dist. LEXIS 14035 (N.D. Ill. July 20, 2004); and *Jackson v. Illinois Bell Tel. Co.*, Case No. 01-C-8001, 2002 U.S. Dist. LEXIS 13186 (July 3, 2002).¹ In *OKI*, the description of the means was “using devices that embody the patented methods, including 4 megabit and higher density DRAMs.” *OKI* at *9. In *One World*, the plaintiffs sued three defendants for infringement of one patent, entitled “Ergonomic Miter Saw Handle.” *One World* at *2. In *Jackson*, the description of the means was “each of the defendants has infringed the patent in suit either directly or through acts of contributory infringement or inducement. . . .[one defendant] provides voice mail systems and [the other defendant] sells answering machines.” *Jackson* at *3. Conversely, DTC merely makes conclusory allegations that all fifty-six Defendants make, use, sell, or import “products and services” that infringe the patents-in-suit either “directly, contributorily, or through inducement,” without specifying which theory of infringement applies to which defendant.

II. DTC’S ALLEGATIONS IN ITS AMENDED COMPLAINT DEPART FROM THE GUIDANCE OF FORM 16.

DTC’s reliance on Form 16’s form patent infringement complaint highlights the deficiencies in its Amended Complaint and weighs in favor of dismissal. Form 16 is a simplified pleading “form” involving a **specific** product, “electric motors,” and **only one** defendant. By contrast, DTC’s Amended Complaint includes fifty-six defendants and six patents. Form 16 must be adapted to the specific minimal facts of each case necessary to provide the requisite notice, especially when there are numerous defendants, numerous patents, and numerous

¹ DTC also relies on *Digigan, Inc. v. Ivalidate, Inc.*, Case No. 02 Civ. 420 (RCC), 2004 U.S. Dist. LEXIS 1324 (S.D. N.Y. February 4, 2004). In *Digigan*, however, the defendants used the patents at issue in the case as collateral under a security agreement to secure obligations under the Advance Letter. When one defendant failed to pay, plaintiff foreclosed on the collateral- the patents at issue in the case. Furthermore, the complaint alleged infringement of only two patents and alleged that the defendants were alter egos of each other. As such, *Digigan* also weighs in favor of dismissing DTC’s Amended Complaint.

products at issue.² See *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at *1 (N.D. Cal. Sept. 6, 2003) (stating, in granting defendant's motion to dismiss, that Form 16 is limited to a single type of product, electric motors, and it does not address a situation where there are over 150 different types of products with more than 4000 end-user applications any of which could fall under the plaintiff's inadequate complaint); *In re Papst Licensing GmbH Patent Litig.*, No. CIV. A. MDL 1298, CIV. A. 99-3118, 2001 WL 179926, at *1 (E.D. La. Feb. 22, 2001) (finding that the complaint had to be amended although plaintiff argued it adhered to Form 16 because "the number of patents and products in the case . . . are far greater than those contemplated in the sample complaint [in Form 16], which would justify a request for greater specificity.").

For example, in *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at *1-2 (N.D. Cal. Sept. 6, 2003),³ the court granted the defendant's motion to dismiss because the plaintiff's complaint failed to give the defendant fair notice of the claims against it. In *Hewlett-Packard*, the plaintiff simply alleged that

[Defendant], in violation of 35 U.S.C. § 271, has been and is currently infringing, contributorily infringing, or inducing infringement of [the patents-in-suit] by, among other things, *making, using, offering to sell and/or selling infringing software and hardware products* without authority or license from [Plaintiff].

Id. at *1 (punctuation and emphasis in original). Contrary to DTC's argument to this Court, the *Hewlett-Packard* court found that such pleading did not provide the defendant with fair notice, especially in light of the defendant's production of at least 150 products with more than 4000

² This is not a heightened pleading requirement for patent infringement cases as DTC alleges the Defendants seek. Instead, this is consistent with providing the Defendants with fair notice under the Federal Rules of Civil Procedure.

³ *Hewlett-Packard* was decided three years after *Phonometrics* and five years after *OKI*, two cases on which DTC heavily relies. Furthermore, the court in *Hewlett-Packard* took both of these cases into account and acknowledged the *OKI* ruling but, even though it was from the same court, disagreed with *OKI*'s liberal reading of Rule 8(a)(2) and Form 16. *Hewlett-Packard*, 2003 WL 23884794, at *1, n.2.

end-user applications, all of which could fall under the vague and conclusory allegations found in the complaint.⁴ *Id.* Instead of allowing the parties to proceed to discovery with vague and conclusory allegations, the court acknowledged the pleading and notice deficiencies, and therefore, dismissed the complaint. *See Hewlett-Packard*, 2003 WL 23884794, at *1-2. Discovery is not a substitute for adequate pleading under the Federal Rules of Civil Procedure.

DTC's allegations of "products and services" do not meet the level of factual detail as provided in the *Hewlett-Packard* complaint, and as provided in Form 16. This is especially true given the many lines of business in which each of the various Defendants, including operating banks, holding companies, third party financial processors, and hardware and software vendors, is engaged. DTC's allegations of "products and services" does not provide the requisite fair notice to these fifty-six Defendants who offer a wide array of "products and services." Furthermore, DTC's insufficient allegations regarding the means by which these fifty-six Defendants infringe one or more of the six patents at issue will only cause delay as these Defendants attempt to ascertain the claims against them. Accordingly, DTC's Amended Complaint does not provide fair notice to the Defendants and should be dismissed.⁵

III. CONCLUSION

For the reasons stated herein and in the Defendants' opening brief, the Defendants respectfully request that their Motion to Dismiss be granted.

⁴ The court stated that because of the number of products potentially at issue, the complaint actually read "one or more of Defendant's 4000-plus products directly infringes, contributorily infringes, or induces infringement of at least one claim in each of the patents-in-suit." *Hewlett-Packard*, 2003 WL 23884794, at *1. Moreover, the *Hewlett-Packard* court found that the plaintiff's allegations regarding contributory infringement and inducement were inadequate and deficient. The court held that merely stating that defendant sold infringing products was insufficient to put the defendant on notice as to these causes of action. *Hewlett-Packard*, 2003 WL 23884794, at *1-2.

⁵ *See also Ondeo Nalco Co. v. EKA Chems., Inc.*, Case No. Civ.A. 01-537-SLR, 2002 WL 1458853, at *1-2 (D. Del. June 10, 2002) (dismissing counterclaims for patent infringement because they were "too vague to provide plaintiff with fair notice of which products are accused of infringing defendant's patents").

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Dated: June 21, 2006

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on June 21, 2006 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

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